

MONEY MANAGEMENT ACT AMENDMENTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: David Clark

LONG TITLE

General Description:

This bill modifies the Money Management Act to allow the use of investment advisers by public treasurers.

Highlighted Provisions:

This bill:

- ▶ defines the term "certified investment adviser" and establishes requirements and fees necessary to become a certified investment adviser;
- ▶ allows public treasurers to engage certified investment advisers to make security trades in their behalf;
- ▶ allows certified investment advisers to make trades with broker-dealers not on the Certified Dealer List;
- ▶ establishes enforcement mechanisms and other remedies for the violation of this chapter; and
- ▶ makes technical corrections.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

51-7-3, as last amended by Chapter 133, Laws of Utah 1996

51-7-11, as last amended by Chapter 225, Laws of Utah 1999

51-7-18, as last amended by Chapter 133, Laws of Utah 1996

51-7-18.3, as enacted by Chapter 229, Laws of Utah 1990

ENACTS:

51-7-11.5, Utah Code Annotated 1953

51-7-18.4, Utah Code Annotated 1953

51-7-22.4, Utah Code Annotated 1953

51-7-22.5, Utah Code Annotated 1953

51-7-24, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **51-7-3** is amended to read:

51-7-3. Definitions.

As used in this chapter:

(1) "Agent" means "agent" as defined in Section 61-1-13.

~~(1)~~ (2) "Certified dealer" means:

(a) a primary reporting dealer recognized by the Federal Reserve Bank of New York who is certified by the director as having met the applicable criteria of council rule; or

(b) a broker dealer who:

(i) has and maintains an office and a resident registered principal in the state;

(ii) meets the capital requirements established by council rules;

(iii) meets the requirements for good standing established by council rule; and

(iv) is certified by the director as meeting quality criteria established by council rule.

(3) "Certified investment adviser" means a federal covered adviser, as defined in Section 61-1-13, or an investment adviser, as defined in Section 61-1-13, who is certified by the director as having met the applicable criteria of council rule.

~~(2)~~ (4) "Commissioner" means the commissioner of financial institutions.

~~(3)~~ (5) "Council" means the State Money Management Council created by Section 51-7-16.

~~(4)~~ (6) "Director" means the director of the Utah State Division of Securities of the

Department of Commerce.

~~[(5)]~~ (7) "First tier commercial paper" means commercial paper rated by at least two nationally recognized statistical rating organizations in the highest short-term rating category.

~~[(6)]~~ (8) "Funds functioning as endowments" means funds, regardless of source, whose corpus is intended to be held in perpetuity by formal institutional designation according to the institution's policy for designating those funds.

~~[(7)]~~ (9) "Hard put" means an unconditional sell-back provision or a redemption provision applicable at issue to a note or bond, allowing holders to sell their holdings back to the issuer or to an equal or higher-rated third party provider at specific intervals and specific prices determined at the time of issuance.

(10) "Investment adviser representative" means "investment adviser representative" as defined in Section 61-1-13.

~~[(8)]~~ (11) (a) "Investment agreement" means any written agreement that has specifically negotiated withdrawal or reinvestment provisions and a specifically negotiated interest rate.

(b) "Investment agreement" includes any agreement to supply investments on one or more future dates.

~~[(9)]~~ (12) "Market value" means market value as defined in the Master Repurchase Agreement.

~~[(10)]~~ (13) "Master Repurchase Agreement" means the current standard Master Repurchase Agreement approved by the Public Securities Association or by any successor organization.

~~[(11)]~~ (14) "Maximum amount" means, with respect to qualified depositories, the total amount of:

- (a) deposits in excess of the federal deposit insurance limit; and
- (b) nonqualifying repurchase agreements.

~~[(12)]~~ (15) "Money market mutual fund" means an open-end managed investment fund:

(a) that complies with the diversification, quality, and maturity requirements of Rule 2a-7 or any successor rule of the Securities and Exchange Commission applicable to money market

mutual funds; and

(b) that assesses no sales load on the purchase of shares and no contingent deferred sales charge or other similar charges, however designated.

~~[(13)]~~ (16) "Nationally recognized statistical rating organization" means an organization that has been designated as a nationally recognized statistical rating organization by the Securities and Exchange Commission's Division of Market Regulation.

~~[(14)]~~ (17) "Nonqualifying repurchase agreement" means a repurchase agreement evidencing indebtedness of a qualified depository arising from the transfer of obligations of the United States Treasury or other authorized investments to public treasurers that is:

- (a) evidenced by a safekeeping receipt issued by the qualified depository;
- (b) included in the depository's maximum amount of public funds; and
- (c) valued and maintained at market value plus an appropriate margin collateral requirement based upon the term of the agreement and the type of securities acquired.

~~[(15)]~~ (18) "Operating funds" means current balances and other funds that are to be disbursed for operation of the state government or any of its boards, commissions, institutions, departments, divisions, agencies, or other similar instrumentalities, or any county, city, school district, political subdivision, or other public body.

~~[(16)]~~ (19) "Permanent funds" means funds whose principal may not be expended, the earnings from which are to be used for purposes designated by law.

~~[(17)]~~ (20) "Permitted depository" means any out-of-state financial institution that meets quality criteria established by rule of the council.

~~[(18)]~~ (21) "Public funds" means monies, funds, and accounts, regardless of the source from which the monies, funds, and accounts are derived, that are owned, held, or administered by the state or any of its boards, commissions, institutions, departments, divisions, agencies, bureaus, laboratories, or other similar instrumentalities, or any county, city, school district, political subdivision, or other public body.

~~[(19)]~~ (22) (a) "Public monies" means "public funds."

(b) "Public monies," as used in Article VII, Sec. 15, Utah Constitution, means the same

as "state funds."

~~[(20)]~~ (23) "Public treasurer" includes the state treasurer and the official of any state board, commission, institution, department, division, agency, or other similar instrumentality, or of any county, city, school district, political subdivision, or other public body who has the responsibility for the safekeeping and investment of any public funds.

~~[(21)]~~ (24) "Qualified depository" means a Utah depository institution or an out-of-state depository institution, as those terms are defined in Section 7-1-103 that is authorized to conduct business in this state under Section 7-1-702 or Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, whose deposits are insured by an agency of the federal government and that has been certified by the commissioner of financial institutions as having met the requirements established under this chapter and the rules of the council to be eligible to receive deposits of public funds.

~~[(22)]~~ (25) "Qualifying repurchase agreement" means a repurchase agreement evidencing indebtedness of a financial institution or government securities dealer acting as principal arising from the transfer of obligations of the United States Treasury or other authorized investments to public treasurers only if purchased securities are:

(a) delivered to the public treasurer's safekeeping agent or custodian as contemplated by Section 7 of the Master Repurchase Agreement; and

(b) valued and maintained at market value plus an appropriate margin collateral requirement based upon the term of the agreement and the type of securities acquired.

(26) "Securities division" means Utah's Division of Securities created within the Department of Commerce by Section 13-1-2.

~~[(23)]~~ (27) "State funds" means:

(a) public monies raised by operation of law for the support and operation of the state government; and

(b) all other monies, funds, and accounts, regardless of the source from which the monies, funds, or accounts are derived, that are owned, held, or administered by the state or any of its boards, commissions, institutions, departments, divisions, agencies, bureaus, laboratories, or other

similar instrumentalities.

Section 2. Section **51-7-11** is amended to read:

51-7-11. Authorized deposits or investments of public funds.

(1) [A] (a) Except as provided in Subsection (1)(b), a public treasurer may conduct investment transactions only through qualified depositories, certified dealers, or directly with issuers of the investment securities.

(b) A public treasurer may, in furtherance of his duties, designate a certified investment adviser to make trades on behalf of the public treasurer.

(2) The remaining term to maturity of the investment may not exceed the period of availability of the funds to be invested.

(3) Except as provided in Subsection (4), all public funds may be deposited or invested only in the following assets that meet the criteria of Section 51-7-17:

(a) negotiable or nonnegotiable deposits of qualified depositories;

(b) qualifying or nonqualifying repurchase agreements and reverse repurchase agreements with qualified depositories using collateral consisting of:

(i) Government National Mortgage Association mortgage pools;

(ii) Federal Home Loan Mortgage Corporation mortgage pools;

(iii) Federal National Mortgage Corporation mortgage pools;

(iv) Small Business Administration loan pools;

(v) Federal Agriculture Mortgage Corporation pools; or

(vi) other investments authorized by this section;

(c) qualifying repurchase agreements and reverse repurchase agreements with certified dealers, permitted depositories, or qualified depositories using collateral consisting of:

(i) Government National Mortgage Association mortgage pools;

(ii) Federal Home Loan Mortgage Corporation mortgage pools;

(iii) Federal National Mortgage Corporation mortgage pools;

(iv) Small Business Administration loan pools; or

(v) other investments authorized by this section;

(d) commercial paper that is classified as "first tier" by two nationally recognized statistical rating organizations, one of which must be Moody's Investors Service or Standard and Poor's, which has a remaining term to maturity of 270 days or less;

(e) bankers' acceptances that:

(i) are eligible for discount at a Federal Reserve bank; and

(ii) have a remaining term to maturity of 270 days or less;

(f) fixed rate negotiable deposits issued by a permitted depository that have a remaining term to maturity of 365 days or less;

(g) obligations of the United States Treasury, including United States Treasury bills, United States Treasury notes, and United States Treasury bonds;

(h) obligations other than mortgage pools and other mortgage derivative products issued by, or fully guaranteed as to principal and interest by, the following agencies or instrumentalities of the United States in which a market is made by a primary reporting government securities dealer:

(i) Federal Farm Credit banks;

(ii) Federal Home Loan banks;

(iii) Federal National Mortgage Association;

(iv) Student Loan Marketing Association;

(v) Federal Home Loan Mortgage Corporation;

(vi) Federal Agriculture Mortgage Corporation; and

(vii) Tennessee Valley Authority;

(i) fixed rate corporate obligations that:

(i) are rated "A" or higher or the equivalent of "A" or higher by two nationally recognized statistical rating organizations, one of which must be by Moody's Investors Service or Standard and Poor's;

(ii) are publicly traded; and

(iii) have a remaining term to final maturity of 365 days or less or is subject to a hard put at par value or better, within 365 days;

(j) tax anticipation notes and general obligation bonds of the state or of any county, incorporated city or town, school district, or other political subdivision of this state, including bonds offered on a when-issued basis without regard to the limitation in Subsection (7);

(k) bonds, notes, or other evidence of indebtedness of any county, incorporated city or town, school district, or other political subdivision of the state that are payable from assessments or from revenues or earnings specifically pledged for payment of the principal and interest on these obligations, including bonds offered on a when-issued basis without regard to the limitation in Subsection (7);

(l) shares or certificates in a money market mutual fund as defined in Section 51-7-3;

(m) variable rate negotiable deposits that:

(i) are issued by a qualified depository or a permitted depository;

(ii) are repriced at least semiannually; and

(iii) have a remaining term to final maturity not to exceed two years;

(n) variable rate securities that:

(i) (A) are rated "A" or higher or the equivalent of "A" or higher by two nationally recognized statistical rating organizations, one of which must be by Moody's Investors Service or Standard and Poor's;

(B) are publicly traded;

(C) are repriced at least semiannually; and

(D) have a remaining term to final maturity not to exceed two years or are subject to a hard put at par value or better, within 365 days;

(ii) are not mortgages, mortgage-backed securities, mortgage derivative products, or any security making unscheduled periodic principal payments other than optional redemptions.

(4) The following public funds are exempt from the requirements of Subsection (3):

(a) funds of the permanent land grant trust funds established pursuant to the Utah Enabling Act and the Utah Constitution;

(b) funds of member institutions of the state system of higher education and funds of public education foundations acquired by:

- (i) gift, devise, or bequest; or
 - (ii) federal or private grant;
 - (c) the corpus of funds functioning as endowments of member institutions of the state system of higher education and the corpus of funds functioning as endowments of public education foundations;
 - (d) the Employers' Reinsurance Fund created in Section 34A-2-702; and
 - (e) the Uninsured Employers' Fund created in Section 34A-2-704.
- (5) If any of the deposits authorized by Subsection (3)(a) are negotiable or nonnegotiable large time deposits issued in amounts of \$100,000 or more, the interest shall be calculated on the basis of the actual number of days divided by 360 days.
- (6) A public treasurer may maintain fully insured deposits in demand accounts in a federally insured nonqualified depository only if a qualified depository is not reasonably convenient to the entity's geographic location.
- (7) The public treasurer shall ensure that all purchases and sales of securities are settled within 15 days of the trade date.

Section 3. Section **51-7-11.5** is enacted to read:

51-7-11.5. Certified investment advisers -- Scope of and limits to authority.

- (1) Except as provided in Subsection (2), certified investment advisers may not make any investments that are inconsistent with this chapter or rules of the council.
- (2) (a) Except as provided in Subsection (2)(b), certified investment advisers acting on behalf of a public treasurer shall conduct investment transactions only through qualified depositories, certified dealers, or directly with issuers of the investment securities.
 - (b) Certified investment advisers may use a non-certified dealer, if the council has qualified the non-certified dealer according to the procedures and requirements established in the rules made as required in Subsection (2)(c).
- (c) The council shall make rules establishing standards and procedures that certified investment advisers may follow in order to qualify non-certified dealers.

Section 4. Section **51-7-18** is amended to read:

51-7-18. Duties of council.

(1) The council shall:

(a) advise the state treasurer and other public treasurers about investment policies;

(b) cooperate with the commissioner of financial institutions by promoting measures and rules that will assist in strengthening the banking and credit structure of the state;

(c) at least annually, review the rules adopted under the authority of this chapter that relate to the deposit and investment of public funds;

(d) at least annually, distribute the rules and amendments to rules adopted under the authority of this chapter that relate to the deposit and investment of public funds to all public treasurers; and

(e) provide, at least semiannually, a list of certified dealers that meet criteria established by this chapter and council rules.

(2) The council may:

(a) recommend proposed changes in statutes governing the deposit and investment of public funds to the Legislature;

(b) make rules governing:

(i) the financial reporting requirements of qualified depositories in which public funds may be deposited;

(ii) the conditions and procedures for maintaining and revoking a financial institution's designation as a qualified depository;

(iii) the definition of depository capital;

(iv) the conditions for maintaining deposits at a permitted depository;

(v) the conditions and procedures for maintaining and revoking a primary reporting dealer's or a broker dealer's designation as a certified dealer;

(vi) certified investment advisers who deal with public treasurers, including establishing standards and requirements for the use, qualification, and regulation of certified investment advisers;

(vii) the conditions and procedures for maintaining and revoking a federal covered

adviser's or an investment adviser's designation as a certified investment adviser:

~~[(vi)]~~ (viii) the conditions and procedures by which public treasurers may deposit and invest public funds;

~~[(vii)]~~ (ix) quality criteria for corporate obligations;

~~[(viii)]~~ (x) the conditions and procedures by which public entities may use interest rate contracts authorized by Subsection 51-7-17~~[(2)]~~(3); and

~~[(ix)]~~ (xi) other rules necessary to carry out its functions, powers, duties, and responsibilities under this chapter.

(3) The council may not make rules requiring a qualified depository to pledge or deposit any of its assets in order to secure a deposit of public funds, except that public deposits in excess of the maximum amount shall be collateralized as provided in Subsections 51-7-18.1(5)(b) and (6).

(4) Subject to legislative funding, the state treasurer shall supply qualified staff to the council.

(5) If any rule or act of the council would constitute an infringement upon the state treasurer's constitutional duties and powers to have custody of and invest public money, the conflicting rule or act is advisory and not mandatory.

Section 5. Section **51-7-18.3** is amended to read:

51-7-18.3. Certified dealers' list -- Fees.

(1) (a) The council shall provide a list of certified dealers to each public treasurer at least semiannually.

(b) The list of certified dealers shall include:

(i) the name of each certified dealer; and

(ii) the name of each agent authorized by the certified dealer to conduct investment transactions with the public treasurers.

(2) In addition to the requirements set forth by rule, in order to become a certified dealer as defined in Section 51-7-3, a dealer shall pay to the director an annual certification fee of \$500 due ~~[May]~~ on or before April 30 of each year.

Section 6. Section **51-7-18.4** is enacted to read:

51-7-18.4. Certified investment advisers' list -- Fees.

(1) (a) The council shall provide a list of certified investment advisers to each public treasurer at least semiannually.

(b) The list of certified investment advisers shall include:

(i) the name of each certified investment adviser; and

(ii) the name of each investment adviser representative authorized by the certified investment adviser to provide investment advisory services to public treasurers.

(2) In addition to the requirements set forth by rule, in order to become a certified investment adviser as defined in Section 51-7-3, a certified investment adviser shall pay to the director an annual certification fee of \$500 due on or before April 30 of each year.

Section 7. Section **51-7-22.4** is enacted to read:

51-7-22.4. Penalties for violation by certified investment advisers.

(1) Each certified investment adviser who violates Section 51-7-7, 51-7-11, or 51-7-11.5, or who willfully violates any rule or order under this chapter is guilty of a third degree felony.

(2) In addition to any other penalty for a criminal violation of this chapter, the sentencing judge may impose any penalty or remedy provided for in Subsection 51-7-22.5(1)(b).

Section 8. Section **51-7-22.5** is enacted to read:

51-7-22.5. Enforcement.

(1) Whenever it appears to the council that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of this chapter or any rule issued under authority of this chapter:

(a) the council may bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin the acts or practices and to enforce compliance with this chapter or any rule under this chapter; and

(b) upon a proper showing in an action brought under this section, the court may:

(i) issue a permanent or temporary, prohibitory, or mandatory injunction;

(ii) issue a restraining order or writ of mandamus or other extraordinary writ;

(iii) enter a declaratory judgment;

(iv) order disgorgement;

(v) order rescission;

(vi) impose a fine of not more than \$50,000 for each violation of the chapter; or

(vii) provide any other relief that the court considers appropriate.

(2) An indictment or information may not be returned nor may a civil complaint be filed under this chapter more than five years after discovery of the alleged violation.

Section 9. Section **51-7-24** is enacted to read:

51-7-24. Sales and purchase in violation -- Remedies -- Limitation of action.

(1) (a) Each certified investment adviser or certified dealer who transacts securities business with a public treasurer in violation of this chapter or any rule made or order issued under authority of this chapter is liable to the public treasurer.

(b) The public treasurer may either sue to recover either:

(i) damages, if the public treasurer no longer owns the security; or

(ii) the sum of the following, less the amount of any income received on the security upon the tender of the security:

(A) the consideration paid for the security;

(B) interest at 12% per year from the date of payment;

(C) costs; and

(D) reasonable attorney's fees.

(c) Damages are the amount that would be recoverable upon a tender less the value of the security when the public treasurer disposed of it and interest at 12% per year from the date of disposition.

(2) If the court finds that the violation was reckless or indifferent, the court may, in a suit brought under Subsection (1), award an amount equal to three times the consideration paid for the security before adding interest, costs, and attorney's fees and before subtracting the income received from the sale of the security.

(3) (a) Each person who directly or indirectly controls a seller or buyer or investment

adviser is liable under Subsection (1).

(b) Except as provided in Subsection (3)(c), the following are liable jointly and severally with and to the same extent as the seller or purchaser:

(i) each partner, officer, or director of a seller or buyer;

(ii) each person occupying a similar status or performing similar functions;

(iii) each employee of a seller or buyer who materially aids in the sale or purchase;

(iv) each certified investment adviser who materially aids in providing the advice; and

(v) each broker-dealer or agent who materially aids or abets in the sale.

(c) The nonseller or nonpurchaser is not liable under Subsection (3)(b) if the nonseller or nonpurchaser proves that he did not know or should have known, and in exercise of reasonable care could not or should not have known, of the existence of the facts that caused the alleged liability.

(4) An action to enforce any liability under this section must begin within five years of the act or transaction constituting the violation or two years after the discovery by the public treasurer of the facts constituting the violation, whichever occurs later.

(5) A person may not base any suit on a contract if:

(a) the person made or engaged in the performance of the contract in violation of this chapter or any rule or order issued under the authority of this chapter; or

(b) the person acquired any purported right under the contract with knowledge of the facts by reason of which the making of the contract or the performance of the contract was a violation of this chapter or any rule or order issued under the authority of this chapter.

(6) A condition, stipulation, or provision binding a treasurer acquiring a security to waive compliance with this chapter or a rule made or order issued under authority of this chapter is void.

(7) The rights and remedies provided by this section are in addition to any other rights or remedies that may exist at law or in equity.